Supreme Court, U. S.
FILED
JUL 29 1976
MICHAEL RODAK, JR., CLERK

In The

# Supreme Court of the United States

October Term, 1975

No. 75-1657

STATE OF NORTH CAROLINA,
*Petitioner,*

v.

FEDERAL POWER COMMISSION,
APPALACHIAN POWER COMPANY, INC.,
COMMONWEALTH OF VIRGINIA,
STATE OF WEST VIRGINIA,
*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## BRIEF OF THE COMMONWEALTH OF VIRGINIA, RESPONDENT

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## BRIEF OF THE COMMONWEALTH OF VIRGINIA, RESPONDENT

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The Commonwealth of Virginia, Respondent, files this Brief in response to the petition for writ of certiorari for review of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered March March 24, 1976.

## CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is found at 533 F.2d 702 (D.C. Cir. 1976).

## JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 24, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 16 U.S.C. § 825*l*(b). Jurisdiction of the United States Court of Appeals for the District of Columbia Circuit was founded upon 16 U.S.C. § 825*l*(b). Jurisdiction of the Federal Power Commission was founded upon 16 U.S.C. § 797(e).

## QUESTIONS PRESENTED

1. Was the question of the Federal Power Commission's consideration of the scenic river alternative adequately raised to require judicial review by the application for rehearing?

2. Should the licensing proceeding be dismissed for mootness as a result of either the Secretary of the Interior's approval of the New River as a scenic river, or the application of the Governor of North Carolina making the river a scenic study river?

3. Did the Federal Power Commission fail to give adequate consideration to the scenic river alternative in its environmental impact statement in violation of the National Environmental Policy Act?

4. Should the license for the project be set aside because Appalachian Power Company caused the Federal Power Commission to violate federal statutes and regulations pertaining to historical and archaeological properties?



5. Did the Court of Appeals misapply the National Environmental Policy Act and *Udall* v. *Federal Power Commission* in upholding the Federal Power Commission's consideration of the impact of energy conservation measures such as peak load pricing and reduced demand on the need for the project?

## COUNTERSTATEMENT OF THE CASE

The Federal Power Commission's Opinions and Orders Nos. 698 and 698-A granted a license to the Appalachian Power Company to construct a hydroelectric and pumped storage project to be located on the New River in Virginia with reservoirs extending into North Carolina.

The Appalachian Power Company was granted a two-year preliminary permit in March, 1963, by the Commission. In February, 1965, Appalachian applied for a license for the "Blue Ridge Project." Prior to hearings conducted in 1967 on this license application, the Commonwealth of Virginia petitioned for, and was granted, leave to intervene in that proceeding. As a result of considerations placed upon the record of that proceeding, the original project was enlarged and modified. The "Modified Blue Ridge Project," which consists of a lower reservoir of 12,390 acres and an upper reservoir of 26,000 acres, is primarily a Virginia project in that both dams, both power houses, all transmission facilities, and two-thirds of the reservoirs are to be located within the Commonwealth. Hearings on the Modified Project were held in 1969. On October 1, 1969, the Examiner (now Administrative Law Judge) issued his initial decision. Oral arguments were held, further briefs were filed, and a supplemental initial decision was issued by

the Administrative Law Judge on June 21, 1971. Further exceptions were filed, and additional oral arguments were held.

Following publication of a draft environmental impact statement and receipt of comments thereon, the Commission's staff filed its final environmental impact statement on June 18, 1973. The parties were granted an opportunity to cross-examine staff witnesses with respect to the final environmental statement.

The Administrative Law Judge issued a third decision on January 23, 1974. This decision was approved by the Commission for the most part and was adopted in the Opinion and Order No. 698. This order required that the lower reservoir be reduced slightly in size and that the drawdown on the upper reservoir be limited to no more than ten feet at any time.

North Carolina and other parties filed objections to Opinion and Order No. 698. On July 15, 1974, North Carolina filed a petition for rehearing. The petition was denied by Opinion and Order No. 698-A, dated August 12, 1974. North Carolina filed a timely notice of appeal to the United States Court of Appeals for the District of Columbia Circuit.

Opinion and Order No. 698 made the license effective January 2, 1975. On December 13, 1974, North Carolina petitioned the Commission for a stay of the effective date of the license pending the appeal. The Petition was denied by the Commission on December 31, 1974. On January 27, 1975, North Carolina petitioned the Commission for a rehearing of this order, which was denied. North Carolina appealed from this order, but the appeal was dismissed as moot by the Court of Appeals.

The Appalachian Power Company, the Commonwealth of Virginia, and the State of West Virginia were permitted to intervene by the Court of Appeals.



On December 23, 1974, North Carolina petitioned the Court of Appeals for a stay of the Commission's licensing order pending review. This petition was granted on January 31, 1975.

By application, dated September 11, 1975, for leave to adduce additional evidence, North Carolina introduced evidence concerning archaeological resources located within the proposed area of the impoundment.

The Court of Appeals entered its Opinion and Judgment on March 24, 1976, affirming the Commission's grant of the license.

## ARGUMENT

### I.

### North Carolina Did Not Adequately Raise The Issue Of The Scenic River Alternative In Its Petition For Rehearing.

North Carolina contends that the Court of Appeals erred in refusing to consider North Carolina's allegation that the Commission did not adequately consider the scenic river alternative to the Blue Ridge Project. This contention is without merit. The scope of judicial review of a licensing order of the Commission is controlled absolutely by § 313(b) of the Federal Power Act, 16 U.S.C. §825*l*(b). That statute provides, in pertinent part, as follows:

> "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia . . . . No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."

The language of this statute is clear and unequivocal. *Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 2 L.Ed.2d

1345, 78 S.Ct. 1209 (1958). The basic policy consideration embodied in § 313(b) is that a reviewing court would be permitted to usurp the Commission's fact-finding function if it could set aside an administrative determination upon a ground not presented to the Commission. *Unemployment Compensation Commission of Territory of Alaska* v. *Aragon,* 329 U.S. 143, 91 L.Ed. 136, 67 S.Ct. 245 (1946).

An aggrieved party must specifically state his objections to the Commission's order in his application for rehearing if he wishes to preserve those objections for judicial review. The purpose of this specificity requirement is plain: a general contention is meaningless; the Commission must be accurately apprised of an objection to its order so that it can consider and dispose of such objection. Accordingly, it has long been held that a general objection to an agency order will not later constitute a basis for a more specific objection raised for the first time on appeal. *Marshall Field Co.* v. *National Labor Relations Board,* 318 U.S. 253, 87 L.Ed. 744, 63 S.Ct. 585 (1943).

North Carolina has not provided any reasonable ground for failure to raise specifically the scenic river alternative issue.

For these reasons, the Commonwealth respectfully submits that the Court of Appeals properly found that § 313(b) precluded it from considering the scenic river alternative issue.

## II.

### The Licensing Proceeding Has Not Been Mooted By Any Action Under The Wild And Scenic Rivers Act.

North Carolina contends that the licensing proceeding should be dismissed for mootness because of the designation by the Secretary of the Interior of a portion of the New River as a scenic river, or because of the application of the



Governor of North Carolina for such designation. This contention is without merit. The Wild and Scenic Rivers Act, 16 U.S.C. § 1271, *et seq.,* precludes the Commission from licensing projects on certain river segments. *See* 16 U.S.C. § 1278. The segment of the New River in question is not, however, one of the segments to which that Act offers protection. North Carolina does not contend that the segment in question was included as a duly-designated component of the Wild and Scenic Rivers System prior to January 2, 1975, the date on which the Commission's licensing order became effective. North Carolina does contend that the Secretary's subsequent designation of the segment as a scenic river divests the rights of the Appalachian Power Company under the Commission's licensing order. This contention does not find any support in the Act, which protects only included river segments from prospective licensing orders of the Commission. *See* 16 U.S.C. § 1278(a).

North Carolina also contends that the application by her Governor for action by the Secretary bars the exercise of the rights granted under the Commission's licensing order. This contention is also without merit, and the Court of Appeals so found. The Act provides protection to only one other category of river segments than those that have been duly designated as components of the Wild and Scenic Rivers System. That category which is granted protection is a "study river" category, and the Court of Appeals properly concluded that that category is comprised solely of those rivers listed in 16 U.S.C. § 1276(a). North Carolina does not contend that the segment in question is so listed. Accordingly, the segment in question is not entitled to protected status under the Act.

Since the segment of the New River was not, either on the date the license was issued or on the date that the rights under the license became effective, either a duly-designated

component of the System or a "study river," it was not entitled to any protection under the Wild and Scenic Rivers Act. Accordingly, the license issued by the Commission is not affected in any way by that Act.

## III.

### The Commission Gave Adequate Consideration To The Scenic River Alternative.

North Carolina contends that the Commission did not give adequate consideration to the scenic river alternative to the Project. This contention is without merit. In its environmental impact analysis, the Commission proceeded as if the segment of the New River on which the Project would be constructed would be eligible for designation under the Wild and Scenic Rivers Act. In the section of the Final Environmental Impact Statement (FEIS) which concerned alternatives to the Project, the Commission discussed the alternative of denial of the application for the license to construct the Project, *i.e,* the "no action" alternative. In this discussion, the Commission's staff stated:

> "No action on the application would result in preservation of the existing resources: the river, farmlands, forests, the hills, wildlife, species of stream-habitat fish, and other aquatic organisms, in a condition quite similar to that which exists. It would preserve the river for possible selection in the future as a wild or scenic river." FEIS at 73-74.

The foregoing quotation refers implicitly to the detailed description of the River and its Basin (FEIS at 9-12), the climate, flora, and fauna within the area (FEIS at 25-27), and the unavoidable environmental effects of impounding the New River (FEIS at 71).

The purpose of the environmental impact statement process is to alert the President, the Council on Environmental



Quality, the Congress and the public to all known possible environmental consequences of, and alternatives to, the proposed agency action. *Environmental Defense Fund* v. *Corps of Engineers,* 470 F.2d 289 (8th Cir. 1972), *cert. denied,* 412 U.S. 931, 37 L.Ed.2d 160, 93 S.Ct. 2749 (1973); *Natural Resources Defense Council* v. *Morton,* 458 F.2d 827 (D.C. Cir. 1972). The Commission has clearly met this duty. The environmental consequences of licensing the Project were fully discussed, and the alternative of "no action," which would leave the river free, as expressly noted, for designation under the Wild and Scenic Rivers Act, was fully discussed. For these reasons, the Commonwealth submits that the Commission fully satisfied its responsibilities under the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.,* and that North Carolina's contention is unfounded.

## IV.

### The License Should Not Be Set Aside On Account Of Historical And Archaeological Properties.

North Carolina contends that the license should be set aside because the Commission did not have before it surveys concerning historical and archaeological properties in the impoundment area. This contention is without merit. The record is clear that the Appalachian Power Company did not disclose the surveys of historical and archaeological resources in the impoundment area because it feared that those resources would be plundered if that knowledge were placed in the public domain. The Court of Appeals properly found that several years would be required to complete the archaeological excavation and salvage work to recover these resources, and that sufficient time to do so would be available even if the license were made effective immediately. Ac-

cordingly, the Court of Appeals directed the Commission to modify the license to require that the Company provide the necessary time and funding for complete research, excavation and salvage of these resources, and the Commission has so done. If any error was made in this regard, it is clearly harmless error in view of the modification to the licensing order.

## V.

### The Court Of Appeals Properly Affirmed The Commission's Determinations Concerning The Need For The Power From The Project.

North Carolina contends that the Court of Appeals erred in finding that the Commission had adequately considered energy conservation measures in determining whether or not the power to be produced by the Project was needed. This contention is without merit.

It bears emphasis at the outset, as the Court of Appeals stated, that North Carolina raised "only the most generalized concern about 'conservation of energy' in [her petition] for rehearing and never specifically brought such matters as 'peak load pricing' to the Commission's attention." 533 F.2d at 707. Based upon the authorities cited earlier in connection with § 313(b), the Commonwealth submits that the generality with which this issue was raised provides the standard against which the Commission's discussion must be measured. A general discussion by the Commission is sufficient to satisfy the requirements of NEPA where no specific contentions were raised to the Commission in a petition for rehearing.

Notwithstanding the foregoing, the Commonwealth submits that the Commission fully discussed the issue of the need for the power from the project.

The preparation of electric power demand projections is



a highly specialized and extremely complex discipline. Moreover, the preparation of such projections is not meaningful unless it is done on a regional or national basis. In the instant proceeding, the Commission utilized the hardest data and best projections available to determine the need for the power from Blue Ridge: (1) A report by *ECAR Bulk Power Members To The Federal Power Commission Pursuant to Docket R-362, Order 383-2,* April, 1972; and, (2) the Commission's *1970 National Power Survey.* The pertinent conclusions drawn from these sources by the Commission's staff are set forth and discussed in its Final Environmental Impact Statement, at pages 12-13, 15-17, 37, 73-80 and 220-235. Based upon these data and conclusions, the staff of the Commission determined that the Company could not meet its projected load growth without the Project. The Commission agreed.

With respect to North Carolina's allegation that the Commission failed to explain in detail in its impact statement the methodology by which it computed the demand projections, the Commonwealth submits that the Commission fulfilled its responsibilities under NEPA by setting forth its conclusions in language that is understandable to non-technical minds and yet with enough scientific reasoning to alert specialists to particular problems within their respective fields of expertise. *Environmental Defense Fund* v. *Corps of Engineers, supra.* Further, the technical conclusions contained in the impact statement were accompanied, as required, by references to the documents upon which the conclusions were based. *Environmental Defense Fund* v. *Tennessee Valley Authority,* 339 F.Supp. 806 (E.D. Tenn. 1972).

Moreover, it must be pointed out that it is North Carolina which has the burden of proof in this proceeding, and

that she has not demonstrated that the finding of the Commission that the power is needed is not based upon substantial evidence.

For the foregoing reasons, the Commonwealth submits that this Court should find that the decision of the Commission that the power is required is supported by substantial evidence on the record and that the decision-making process of the Commission complied with the letter and the spirit of NEPA.

## CONCLUSION

For the foregoing reasons, the Commonwealth respectfully submits that this Court ought to deny the requested writ of certiorari.

Respectfully submitted,

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